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NEGLIGENCE AND THE RULE OF DAMAGES IN  
ACTIONS THEREFOR.

ACTIONABLE negligence is an unintentional violation of the duty which enjoins care and caution in what we do, from which a legal injury proximately results: Shearman & Redfield on Negligence, § 2, p. 1, note.

It is a violation of the duty enjoining care and caution. Unless such duty exists between particular persons, there can be no negligence in the legal sense of the term: *Tonawanda R. R. Co. v. Munger*, 5 Den. 255, 267; *Philadelphia & Reading R. R. Co. v. Spearen*, 47 Penn. St. 300, 302. Leaving a pit uncovered, may be negligence, if an animal having a right to be on the premises falls into it and be injured, but not if the animal was not there lawfully: Sh. & Redf., § 454.

This duty may arise either from contract, or it may be imposed by law without any express contract between the parties: Sh. & Redf., § 4. What then is this duty?

It may be described in very general terms only, as it necessarily varies according to *circumstances*. "*Sic utere tuo ut alienum non lædas*" is the general principle (*Fish v. Dodge*, 4 Den. 311, 316; *Cleveland & Columbus R. R. Co. v. Keary*, 3 Ohio St. 201; *Morgan v. Cox*, 22 Mo. 373, 375); in explaining which, the law proceeds on the presumption, that men ordinarily do their duty, and hence, it is the duty of every man to conduct himself and manage his property with *ordinary* care and diligence: *Shrews-*

*bury v. Smith*, 12 Cush. 177, 180. Hence negligence is said to be, the omission to do something which a reasonable man guided upon the considerations which *ordinarily* regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do: *Ernst v. Hudson River R. R. Co.*, 35 N. Y. 927. More than this ordinary care the law does not require (Sh. & Redf. 6), though greater care be possible. Injury resulting from no want of this ordinary care, though it might have been avoided by the use of greater care, is, in consideration of the law, an inevitable accident: *Dygert v. Bradley*, 8 Wend. 469, 473; *Brown v. Kendall*, 6 Cush. 292, 296.

From the requirement of ordinary care follows that what might be the care required by law in one case, might be negligence in another, and in still another greater care than the law requires: *Philadelphia & Reading R. R. Co. v. Spearen*, 47 Penn. St. 300, 304, 305; *Wolf v. Am. Ex. Co.*, 43 Mo. 421, 425.

Men ordinarily conform the care they take to the circumstances under which they act: *Cayzer v. Taylor*, 10 Gray 274, 280; *Brown v. Kendall*, *supra*. Such ordinary care and conduct of men the law sets as an example, demanding greater or less care according to circumstances (*Vaughn v. Seade*, 30 Mo. 600; *Bowen v. N. Y. Central R. R. Co.*, 18 N. Y. 408, 410, 411; *Hagemann v. Western R. R. Corp.*, 13 N. Y. 9, 25; *Johnson v. Hudson River R. R. Co.*, 20 N. Y. 65, 75; *Edwards v. Lord*, 49 Maine 279, 281; *Brown v. Kendall*, *supra*); in proportion to the dangers (*Johnson v. Hudson River R. R. Co.*, *supra*; *Ernst v. Same*, *supra*; *Brown v. Lynn*, 31 Penn. St. 372); in proportion to the injury that might result, whether it be to life or limb, or to property only, and whether such property be of greater or less value (*Morgan v. Cox*, 22 Mo. 373, 375, see 566), and also in proportion to the means devised to prevent any injury: Sh. & Redf., § 7; *Penna. R. R. Co. v. Kelly*, 31 Penn. St. 372; *Phila. & Reading R. R. Co. Spearen*, 47 Penn. St. 300, 304; *Berge v. Gardiner*, 19 Conn. 507, 511; *Boland v. Missouri R. R. Co.*, 36 Mo. 484, 490; *O'Flaherty v. Union R. W. Co.*, 45 Mo. 70, 73.

But in determining what is ordinary care we must also consider the person from whom such care is required. The law does not exact the same care from an infant as from an adult, nor from an idiot or a lunatic as from a sane man. The law requires in such cases such care as is usual among such persons or children of such

age. But while the law requires ordinary care of a man, he may increase or diminish the degree of care he is bound to use. "If one does an act of pure favor for another with assent of the latter, his responsibility to him is reduced to the duty of merely slight care and diligence. And on the other hand, the party receiving the favor is bound to exercise great care and diligence therein for the benefit of the party conferring it:" Sh. & Redf., § 22. Thus the degree of care required differs in the different kinds of bailments: 2 Kent's Com. 560, 568, 573, 577, 585.

The different relationships of the parties seem to be the legal foundation of the different degrees of care and negligence which we find mentioned in the text books, and in regard to which some are of the opinion, that they are useless distinctions: Sh. & Redf., §§ 16, 23; *McPheeters v. Han. & St. Jo. R. R. Co.*, 45 Mo. 22, 26; *Mueller v. Putnam Fire Ins. Co.*, 45 Mo. 85; but see *Callahan v. Warne*, 40 Mo. 131, 138. In our opinion, the distinction of negligence into slight, ordinary and gross negligence, corresponding to great, ordinary and slight care, is well founded.

What then are slight, ordinary and gross negligence? "Slight negligence is the want of great care and diligence; ordinary negligence is the want of ordinary care and diligence; and gross negligence is the want of even slight care and diligence:" Sh. & Redf., § 18. "Slight care is such as is usually exercised under circumstances similar to those of the particular case in which the question arises and where their own interests are to be protected from a similar injury by men of common sense but careless habits; ordinary care is such as is usually exercised in the like circumstances by the majority of the community, or by men of careful and prudent habits; and great care is such as is exercised under such circumstances by men of unusually careful and prudent habits:" Sh. & Redf., § 20; See *Ernst v. Hudson River R. R. Co.*, 35 N. Y. 9, 27; *Brown v. Kendall*, 6 Cush. 292, 296; *Brown v. Lynn*, 31 Penn. 512.

Whatever degree of care the law may require, it is negligence if there is an unintentional violation of this duty, which becomes actionable if a legal injury proximately results therefrom. Negligence without injury is not actionable. The rule *Ex damno sine injuria non oritur actio*, may be inverted: *Ex injuria sine damno non oritur actio*, if we only remember that the law implies *damnum* in certain cases: Sh. & Redf., § 8; Sedgw. 32. If the injury

might have resulted from the negligence, but would have resulted though there had been no want of care, the negligence is not actionable: Sh. & Redf., § 429.

And it must be a legal injury, one that the law recognises as such. If one follows an unlawful business, or a lawful business without authority, and he be injured in such business through the negligence of another, the law gives him no cause of action: Sh. & Redf., § 25; *Sherman v. Fall River Iron Works*, 5 Allen 213, 216. Furthermore, such injury must proximately result from the negligence. Negligence to be actionable must be the proximate cause of the injury, not the remote cause: Sh. & Redf., §§ 9, 53. But this does not require that such negligence should be the nearest cause; there may be intervening causes, without which the injury would not have happened, and yet such negligence may remain the proximate cause. This is the case where the acts of intervening persons are the natural, necessary or legal results of the negligent person's conduct.

Only one point remains to be considered. We defined negligence as an unintentional violation of a duty. In this it is distinguished from malice or fraud. However great and gross negligence may be, there is never a purpose to do a wrongful act, or to omit the performance of a duty. Though gross negligence may be evidence of fraud, yet it is not fraud, and so of malice: Sh. & Redf., § 3, p. 3, n. 7; *Gardner v. Heart*, 3 Den. 232, 236; *Tonawanda R. R. Co. v. Munger*, 5 Den. 255, 267; *Tally v. Ayres*, 3 Sneed 677, 680.

II. After having considered what is actionable negligence, we will now inquire into the rule of damages. The question is not simply as to the measure of damages. "The rule of damages" is more comprehensive. Still it does not seem comprehensive enough to embrace all questions touching actions for negligence. Confining ourselves to what seems properly to come under "the rule of damages," we will consider 1st, By and from whom damages may be recovered, and 2d, What is the measure of damages.

Before going into the first of these questions, it might be well to state, that the rule applies not only to natural but to artificial persons also. The same rule of liability has been frequently applied as well as to individuals (*Fifield v. Northern R. R.*, 42 N. H. 225, 231; *Gilman v. Eastern R. R. Corp.*, 10 Allen 233, 238; *Cleveland St. R. R. v. Keary*, 3 Ohio St. 201; as to quasi cor-

porations see Sh. & Redf., § 118; *Bigelow v. Randolph*, 14 Gray 541); and we see no reason why the rule as to the rights should not equally apply where a proper case arises.

1. In asking: By and from whom damages may be recovered, we must distinguish between such as stand in the relation of master and servant, and such as do not hold that position, for this relationship greatly modifies the general rule, which we will now consider.

But here again we must distinguish those cases where the negligence is independent of any contract, and those where it relates to a contract between the parties. In the former cases every person proximately, although not directly, injured through the negligence of another, may recover from him; in the latter cases, only he who, being a party to the contract, has suffered in consequence of such negligence may recover from the negligent party to the contract. In both classes of cases, however, the party seeking to recover must not have been guilty of contributory negligence, which would constitute a complete bar at common law, though not in admiralty.

As negligence is a violation of a duty, only those can be parties to an action for negligence between whom this duty exists. On the other hand, every one who has a right to have such duty performed and who by the violation of that duty has been injured, may recover, for where there is a wrong there is a remedy. If, then, this duty be imposed by law to be exercised towards all men, everybody injured through its violation has a right to recover: Sh. & Redf., § 54, an instructive case; *Thomas v. Winchester*, 6 N. Y. 397. And in such case it is no defence to say, that the injured party was a trespasser, unless he was thereby guilty of contributory negligence: Sh. & Redf., § 38; *Loomis v. Ferry*, 19 Wend. 496; *Birge v. Gardner*, 19 Conn. 507, 512; *Norris v. Litchfield*, 35 N. H. 271, 277.

Neither does it affect the right of the party seeking to recover, whether the injury be the direct or indirect consequence of the negligence. True, in some cases the word "direct" is used so as to apparently indicate, that no damages may be recovered for indirect injury; but in such cases, it seems, "direct" is used for "proximate." All the cases agree that if a servant be injured through the negligence of another, not only the servant may recover for the direct injury, but also the master for the indirect injury in an action *per quod*: Sh. & Redf., § 53. But this rule allowing persons indirectly injured to recover must not be extended too far.

"Indirectly" is not "remotely." The injury should be the proximate, although indirect, consequence of the negligence. Hence, aside from the fact that at common law no damages could be recovered from the negligent party for the death of a person, it has been held that an insurer of life cannot recover from the negligent party for the loss he sustains through the death of the insured: *Sh. & Redf.*, § 53, p. 333, n.; *Com. Mutual Life Ins. Co. v. N. Y. & New Haven R. R. Co.*, 25 Conn. 265, 271, 275.<sup>1</sup>

While in cases where the law imposes a general duty, everybody proximately injured through a violation thereof may recover, yet where this duty arises only on a contract, none but parties thereto or those for whose benefit it is avowedly made, may recover for a violation of such duty. As such persons only can recover on the contract, so they alone can recover for injuries through negligence in its performance. If other parties are thereby injured it is *damnum absque injuria*: *Sh. & Redf.*, § 54; *Winterbottom v. Wright*, 10 M. & W. 109, 115; *Thomas v. Winchester*, 5 N. Y. 397, 408. See an apparent exception: *Bank of Utica v. McKinstler*, 11 Wend. 474.

But in order to entitle the injured party he must not have been guilty of contributory negligence: *Sh. & Redf.*, § 25; *Ad.* 185; *Tallon v. City of Boston*, 3 Allen 138; *Daly v. Norwich & Worcester R. R. Co.*, 26 Conn. 593, 597; *Button v. Hudson River R. R. Co.*, 18 N. Y. 248, 257; *Wilds v. Same*, 24 N. Y. 430, 432; *Reeves v. Larkin*, 19 Mo. 192; *Smith v. Hardesty*, 31 Mo. 411; *Callahan v. Warne*, 40 Mo. 131, 140; *Liddy v. St. Louis R. R. Co.*, 40 Mo. 506, 519. If he was himself in fault, the law will not allow him to take advantage of his own wrong. If he could have escaped the injury and did not through want of proper care, the law says, *Volenti non fit injuria*, and his injury is then *damnum absque injuria*. Contributory negligence is at common law a complete bar to plaintiff's action; the question is never one of comparative negligence between the parties.<sup>2</sup>

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<sup>1</sup> The court in this case indicate the difference between the parties to such a contract, and a master and servant; the latter being a natural legal relation, the former not so. While fire and marine insurance companies may be subrogated to the rights of the insured, *Mason v. Louisbury*, 3 Doug. 64, it seems that this would not be the case in life insurance, the latter contract, unlike the former, not only not being a contract of indemnity, but also because the rights of the insured die with him.

<sup>2</sup> In Illinois Reports expressions are used that might be so misunderstood: *Button v. Hudson River R. R. Co.*, 18 N. Y. 248, 257; *Wilds v. Same*, 24 N. Y. 430, 432.

What is contributory negligence, is then important to know. It is such negligence on the part of the plaintiff or his agent, as does not only concur with the negligence of the defendant or tend to increase the damages, but which proximately contributes in causing the injury.

Contributory negligence must always be the negligence of the plaintiff or of his agent. However many strangers may have contributed in bringing about the injury, it is no defence whereby the defendant might escape: Sh. & Redf., §§ 27, 46; *Eaton v. Boston & Lowell R. R. Co.*, 11 Allen 500, 505.<sup>1</sup> And the plaintiff must have been guilty of negligence. Not every act of the plaintiff contributing in causing the injury will constitute a bar. It must be a violation of that duty which the law imposes on all men, to use ordinary care for their own protection: Sh. & Redf., §§ 29 30; *Huel-senkamp v. Citizens' Railway Co.*, 37 Mo. 537, 546, 550. More than this the law does not require, so that, though by the extremest care and caution the plaintiff might have escaped the injury, yet the want of such care will not constitute contributory negligence: Sh. & Redf., §§ 29, 32; *Daly v. Norwich & Worcester R. R. Co.*, 26 Conn. 593, 597. The law itself presuming that every man does his duty, it is not negligence on the part of the plaintiff, if he does not presume culpable negligence: Sh. & Redf., § 31; *Ernst v. Hudson River R. R. Co.*, 35 N. Y. 9, 28, 35; *Hewson v. New York Central R. R. Co.*, 29 N. Y. 383, 390; *Owen v. Hudson River R. R. Co.*, 35 N. Y. 516, 518; *Kennayde v. Pacific R. R. Co.*, 45 Mo. 255, 261. Neither is plaintiff bound on noticing defendant's negligence to presume all possible dangers (Sh. & Redf., § 31); nor is it negligence to assume some risks, for this is daily done by the most prudent men: Sh. & Redf., § 31. If defendant threw plaintiff off his guard, that conduct may be considered ordinary care, which under other circumstances would constitute negligence: Sh. & Redf., § 28; *Ernst v. Hudson River R. R. Co.*, 35 N. Y. 9, 28; *Kennayde v. Pacific R. R. Co.*, 45 Mo. 255, 262. It is hardly necessary to add that plaintiff's act is not contributory negligence, though it directly contribute in producing the injury, if he was not in fault: *Ingalls v. Bills*, 9 Metc. 1; *Stokes v. Saltonstall*, 13 Pet. 181; *Winters v. Hannibal & St. Jo. R. R. Co.*, 39 Mo. 468.

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<sup>1</sup> It was attempted (*Hartfield v. Roper*, 21 Wend. 615) to make the negligence of the parents a bar to an action by the infant; but see *Boland v. Mo. R. R. Co.*, 36 Mo. 484; *Daly v. Norwich & Worcester R. R. Co.*, 26 Conn. 593, 598.



It must be negligence in order that plaintiff's conduct may bar him, and it must be contributory negligence. The mere fact that the plaintiff was negligent at the time the injury happened, that his negligence was concurrent (Sh. & Redf., § 32, p. 32, n. 3; *Mayer v. Pacific R. R. Co.*, 40 Mo. 151, 156), or even that his negligence increased the damages (Sh. & Redf., § 32), will not excuse the defendant. But the moment the plaintiff's negligence co-operates with the negligence of the defendant in producing the injury, his right to recover becomes doubtful.

Even in such a case the plaintiff is not necessarily barred. Although without the plaintiff's negligence the injury could not have happened, yet unless it contributed proximately, it will not discharge the defendant: *Haley v. Earle*, 30 N. Y. 208, 209; *Adams v. Wiggins Ferry Co.*, 27 Mo., 95. The question is, whether it being conceded that the plaintiff was not without fault, the defendant might by the exercise of reasonable care and prudence at the time of the injury have avoided it: *Butson v. Hudson River R. R. Co.*, 18 N. Y. 248, 258. This is clearly the case where defendant sees the plaintiff's negligence; if he then omits to avoid proper care to avoid injury, he is liable: Sh. & Redf., p. 33, n. 2, 4; § 454; *Spafford v. Allen*, 3 Allen 177, 179; *Adams v. Wiggins Ferry Co.*, 27 Mo. 95.

This rule of contributory negligence applies in courts of common law even in cases of collision of vessels (*Adams v. Wiggins Ferry Co.*, *supra*; *Galena Packet Co. v. Vandergrift*, 34 Mo. 55; *Barnes v. Cole*, 21 Wend. 188); while in courts of admiralty, the loss in such cases is equitably apportioned according to the degree of negligence on each side: Sh. & Redf., 23, n. 1.

We now proceed to consider from whom damages may be recovered. Here again we meet the distinction between duties imposed by law on all, and duties of parties to contracts. In the former case every one violating the duty to use care and caution, and materially contributing in causing the injury, whether he stand in the relation of master and servant or not, is liable: Sh. & Redf., §§ 58, 112, 596, p. 648, n. 1.<sup>1</sup> This rule applies even to infants and persons of unsound mind. Though the care required of them differs from that required of adults and sane men, yet,

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<sup>1</sup> A servant may be personally liable: Sh. & Redf., § 112; both owners of two vehicles negligently driven: Sh. & Redf., § 90.

whenever they are guilty of negligence, the injured party may recover from them: Sh. & Redf., § 57. And if one be injured through the co-operating negligence of several, he may, as in other cases of torts, bring his action against them jointly: Sh. & Redf., §§ 55, 498; Addison on Torts 173.

This rule making every one liable violating the duty of care imposed by law on all men, is, of course, not changed by any contract he may have with another. Such contract cannot excuse him for a breach of duty against any one except those who have become bound by such contract: *Corwin v. N. Y. & Erie R. R. Co.*, 13 N. Y. 42, 49. But the above rule, that the injured party may recover from all whose negligence proximately contributes to his injury, seems to have one exception founded on the policy to hold the carrier to the extremest care.

Where a passenger is injured in case of collision, and both vessels or vehicles are in fault, he has a cause of action against his carrier only, whose negligence, so far as the other carrier is concerned, is treated as that of the passengers: Addison on Torts 176, 177; *Lockhart v. Lichtenthaler*, 4 Am. Law Reg. N. S. 15. Where the duty of care arises on a contract, only a party to the contract is liable for negligence. As only parties to a contract are liable for a breach thereof, so they only are liable for a violation of that duty. Hence a servant is not liable: Sh. & Redf., § 111; *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459, 461; 1 Chitty St. 84. And here it is important to remember that some persons are incapable to contract, while infants may avoid their contracts: Sh. & Redf., § 57.

The law as heretofore laid down is changed, where the relation of master and servant (principal and agent) must be taken into consideration. It lies beyond the limits of the subject we are considering to show who stand in this relation.<sup>1</sup> But it may be well to state, that one who not being a servant, voluntarily assists in performing work, stands in no better position than a servant, and may in law be considered such so as to render the master liable: Sh. & Redf., §§ 106, 107; *Althoff v. Wolfe*, 22 N. Y. 355.

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<sup>1</sup> One himself a servant, is, as to third persons, not liable as a master, though he may select and dismiss his subordinates: Sh. & Redf., § 114; but it is different in the case of a master of a private vessel: Sh. & Redf., § 113; *Dennison v. Seymour*, 9 Wend. 9, 16; See as to public officers—as postmaster: Sh. & Redf., § 180; officers of the army and navy: Sh. & Redf., § 181.

Whoever, in view of the law, holds the position of master has a peculiar responsibility. The general rule is, that no one is liable for the negligence of another, but in the case of a master the rule changes: Sh. & Redf., § 60; Addison 198, 199; Schouler Dom. Relations 638. His liability is, however, not the same in all cases of negligence. We will consider his liability to strangers and to his servants. Where one, a stranger, not himself a servant of the same master, is injured by a servant, the rule applies, *qui facit per alium facit per se* (Addison 198), and hence *respondeat superior*: Story on Agency, § 452; Blackst. Com. 431. Throughout the law, the servant acting as such, is considered as standing in the place of the master, a rule required by public policy, and whence the servant's negligence becomes that of the master: *Blackeson v. N. Y. & Erie R. R. Co.*, Swift (N. Y.) 48, 51, 52.

But the above maxims and the reason of the rule, holding the master responsible for the negligence of his servants, indicate the limits of his responsibility. The master is liable for the servants' negligence only where such negligence occurs in the course of their employment. Outside of this; how could *qui facit per alium, facit per se*, apply? Sh. & Redf., §§ 59, 62; *Harlow v. Humiston*, 6 Cow. 189, 192; Addison 173, 174.

To decide whether a particular act is done in the master's employment, we must inquire, 1st, whether the servant was at all times engaged in serving his master, and 2d, whether the servant was acting within the scope of his authority or what he had a right to consider within such scope: Sh. & Redf., § 63; *Bard v. Yohn*, 26 Penn. St. 482, 488; *Satterlee v. Groat*, 1 Wend. 273.

But if the negligence occurs in the course of employment, the master is liable even though the servant disregarded express orders given by the master: Sh. & Redf., § 68; *Southwick v. Estes*, 7 Cush. 385; *Phila. & Reading R. R. Co. v. Derby*, 14 How. 468. And further, if the servant through his negligence involve himself in difficulties out of which he cannot escape without purposely doing an injury to a third person, even in such a case the master may be responsible: Sh. & Redf., § 67. But this responsibility of the master does not exonerate the negligent servant, who himself remains responsible to the injured party, unless the negligence occur in the performance of a contract, when the master alone is liable: Addison 176.

We now proceed to consider the liability of the master to his servants, and will extend the inquiry further to the liability of

persons standing in the relation of master and servant *inter se*. And 1st, of the master's responsibility to his servants. Here the principle *respondeat superior* does not apply, if the servant is injured through the negligence of a fellow-servant, no negligence being imputable to the master personally : Sh. & Redf., §§ 86, 108 ; Addison 183 ; Schouler Dom. Relations 642 ; *Thoman v. Rochester & Syracuse R. R. Co.*, 13 N. Y. 153, 156 ; *Farwell v. Boston & Worcester R. R. Co.*, 4 Metc. 49 ; leading case *Gilman v. Easton R. R. Corp.*, 10 Allen 233. For the servant in fixing his wages assumes all the ordinary risks of the employment, in which must be included dangers arising from the negligence of fellow-servants ; while, on the other hand, this principle will increase the safety of the servant by making each servant an observer of the conduct of the others : *Farwell v. Boston & Worcester R. R. Co.*, 4 Wend. 49 ; *Thoman v. Rochester, & Syracuse R. R. Corp.*, 17 N. Y. 153 ; *Gilman v. Easton R. R. Corp.*, 10 Allen 233, 236. We might add, that the rule cannot properly apply between fellow-servants that applies as to strangers, to wit, *Respondeat superior*, as neither of two fellow-servants represents the master as against the other ; and further, that unless the rule were as stated, it would be too hazardous to employ servants.

A master not being liable to a servant for the negligence of a fellow-servant, who is such a fellow-servant ? The reason of the rule, to wit, that the servant assumes all the natural and ordinary risks and perils incident to the employment, would show, that only such are fellow-servants as are engaged in the same common employment. Though two persons may be in the employment of the same master, yet if they are not engaged in the same common employment they are not fellow-servants, and if one is injured through the negligence of the other, the rule *respondeat superior* applies : Sh. & Redf., §§ 108, 109. But persons may be engaged in the same common employment, or in the same work, and yet not be fellow-servants within the rule. To make them such they must be employed by the same master. For the rule exempting the master from liability, is founded on the idea that the master in the wages pays for the risk, which is not the case when two are not employed by the same master : Sh. & Redf., § 101 ; Addison 184 ; Schouler Dom. Relations 645.

When, however, persons are under the control of the same master in the same common employment, they are fellow-servants

within the rule, no matter whether they be equal, inferior or superior in grade or standing (Sh. & Redf., §§ 100, 103, 104); for this distinction will not prevent the servant from foreseeing the risks and demanding wages accordingly. But there seems to be a class of superior servants who should not be considered fellow-servants with their subordinates. It would seem that, "where a master commits the entire charge of a business to a person with the power to choose his own assistants, and to control them and discharge them as freely and as fully as the principal himself could," such person becomes a vice-principal or manager for whose negligence the master should be held responsible: Sh. & Redf., *supra*. If this were not so, the master by simply delegating his power to appoint and dismiss could clear himself from nearly the whole of his responsibility to his servants. We know that the above limitation of the rule has not been universally recognised (*Albro v. Agawam Can. Co.*, 6 Cush. 75), but think it should be. In some of the Western States courts have gone still further. Thus in Ohio, it is held, that where the master places one of his servants under the control and direction of another who represents the master, he is liable to the former for injuries caused by the negligence of his superior, and this on the principle *Respondeat superior*: Sh. & Redf., § 105; *Little Miami R. R. Co. v. Stevens*, 20 Ohio 415, 435; *Mad River R. R. Co. v. Barber*, 5 Ohio St. 541, 563; *Cleveland R. R. Co. v. Same*, 5 Ohio St. 201, 209, 211, 212. As to less satisfactory rule in Kentucky, see Sh. & Redf., § 105. But while the master is not liable to a servant for the negligence of a fellow-servant, he is liable for his own negligence: *Fifield v. North R. R. Co.*, 42 N. H. 225, 226.

The law implies the contract to use ordinary care and diligence, between master and servant. Whenever the master by his own negligence commits a breach of this implied contract and the servant is injured, he becomes responsible to such servant,<sup>1</sup> and it is

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<sup>1</sup> Sh. & Redf., § 89; *Fifield v. North R. R.*, *supra*; thus if he knowingly and carelessly employ incompetent servants: Sh. & Redf., §§ 90, 91; *Gilman v. Eastern R. R.*, 10 Allen 233, 238; *Curly v. Harris*, 11 Allen 111, 120; *Frazier v. Penn. R. R. Co.*, 38 Penn. 104; or if he provides defective and unsafe materials, machinery and accommodations: Sh. & Redf., §§ 87, 88, 92; *Gilman v. Eastern R. R.*, 10 Allen 233, 238; *Curly v. Harris*, 11 Allen 112, 120; *Buzzell v. Laconia Mfg Co.*, 48 Me. 113; *Hayden v. Smithville Mfg Co.*, 29 Conn. 548, 560; or if he does not disclose dangers: Addison 182; Sh. & Redf., § 93. See as to necessity of "rules and regulations" and the care required in preparing them, Sh. & Redf., § 93; Addison 132.

no defence that the negligence of a fellow-servant contributed in bringing about the injury : *Cayzor v. Taylor*, 10 Gray 274.

But if the master has called the attention of the servant to the risks and dangers, or if the servants have actual knowledge thereof and yet voluntarily remain in the service of the master, without being induced by him to believe a change will be made, or without plainly objecting, they will, if injured, have no right against such master, but will be considered as having assumed the risks : Ad. 181 ; Sh. & Redf., §§ 94, 96 ; *Buzzell v. Laconia Mfg Co.*, 48 Me. 113 ; *Frazier v. Penn. R. R. Co.*, 38 Penn. St. 104. But this rule applies only so far as the servants could reasonably anticipate the danger : *Snow v. Hous. R. R. Co.*, 8 Allen 441.

Hitherto, we considered the liability of the master to his servant. And now of the liability of a servant to his master. The servant is liable for his negligence to his master, if damages have been recovered from the master for such negligence, and he is liable for his negligence in the care of his master's property intrusted to him, though not for ordinary accidents : Addison 32 ; Schouler 626. Finally as to the liability of servants *inter se*. One would naturally suppose that the rule requiring ordinary care, which applies where no particular relation exists between the parties by a contract, should apply also to servants *inter se*. Though there is a particular relation between them, for they are fellow-servants, yet this relation does not arise from any contract between them, but from the separate contract each of them has with the common employer. Between themselves they have no contract. We do not doubt that the general rule applies and that a servant is liable for his negligence to his fellow-servant in the same manner in which persons generally are liable for their negligence.<sup>1</sup>

In considering the rule, by and from whom damages may be recovered, we hitherto assumed that all the parties to the tort were still living and capable of suing and being sued. But how in case of death or bankruptcy of either party ? In case of death the common-law rule was, *Actio personalis moritur cum persona* ; but statutes gave a cause of action to and against executors and administrators in case of injury to property, while more recent statutes

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<sup>1</sup> Sh. & Redf., § 112 ; This is denied and fellow-servants *inter se* made irresponsible : *Albro v. Jaguth*, 4 Gray 99 ; but the reasoning seems, to say the least, unsatisfactory.

give remedies in cases of death through negligence. Who and when he may recover must be gathered from the respective statutes.<sup>1</sup>

In case of bankruptcy it would seem that causes of action for injuries to property pass to the assignee; while the injured party must look to the bankrupt.<sup>2</sup>

2. We finally come to consider the measure of damages. And in the beginning we may say that though the negligence relate to a contract, yet the measure of damages in an action for negligence is not the same as in an action for the breach of contract. In the former the liability of the defendant is much "larger and broader" than in the latter: Sh. & Redf., § 594.

Damages for negligence are either compensatory or exemplary also called punitive. Undoubtedly the law in giving redress for injuries through negligence, as a rule, intends only compensation for the injury suffered: Sedgw. 28. But there are certainly cases, where mere compensation would not answer the purposes of the law. Mere negligence, as a rule, cannot be treated and punished as a crime. And yet negligence in a given case may be so gross as to partake of a criminal nature. In such cases it would seem good policy to allow damages exceeding the injury suffered, as a punishment for the party in fault, and as a warning for him and for others: *Hopkins v. Alb. & St. Law. R. R.*, 36 N. H. 9, 17, 18, 19; *Kennedy v. N. M. R. R.*, 36 Mo. 351, 365. But see *Fay et ux. v. Parker*, 53 N. H., where the court expresses a doubt if in any civil action exemplary damages can be recovered; also *McKeon v. Citizens' R. W. Co.*, 42 Mo. 79, 88; Sedgw. 38. Although there are different opinions as to whether such damages may be allowed, the custom to allow them is well and firmly established: *Kennedy v. N. M. R. R.*, *supra*; *Kountz v. Brown*, 16 B. Mon. 577, 586, 587. But they will, and it seems, should be allowed only in cases of gross negligence where the act partakes of a criminal nature: Sh. & Redf., § 600.

In determining what will be a *compensation* we must ascertain the money-value of the injury suffered by the party seeking to recover. We are to confine ourselves to the damages proximately caused by the defendant's negligence, as we may infer from our

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<sup>1</sup> Such statutes are: 4 Edw. 3, c. 7; 3 and 4 W. 4, c. 42; see 1 Chitty Pld. 68, 69.

<sup>2</sup> Sec. 1 Chitty Pld. 71, 91; also Bankrupt Act of the United States under which such claims cannot be proved.

definition of actionable negligence: Sh. & Redf., §§ 595, 596. If plaintiff through his own fault increased the damages, he *cannot recover for such increase* (Sh. & Redf., §§ 35, 598; *Sherman v. Fall River In. Works*, 2 Allen 524, 526; *Ills. Central R. R. v. Finnigan*, 21 Ills. 646; *Fisher v. Goebel*, 40 Mo. 475; *Waters v. Brown*, 44 Mo. 302; *Rice v. Powell*, 44 Mo. 436; But see Sh. & Redf., p. 35, n. 2; *Lawrence v. Housatonic R. R. Co.*, 29 Conn. 390), as he could not recover at all, if he had contributed in causing the injury.

Furthermore, the damages should be such as could reasonably be anticipated by the party in fault. He is not necessarily liable for all the injury actually flowing from his negligence, if this is the case only on account of collateral circumstances unknown to him. "I entertain," observes POLLOCK, C. B., "considerable doubt whether a person who has been guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable man would have anticipated. I am inclined to consider the rule of law to be this, that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur:" Cited Addison 27; see p. 28; *Griffin v. Colver*, 16 N. H. 489, 491. With this restriction the plaintiff may recover not only for damages he may prove to have suffered before action brought or up to the time of trial, but also for future damages. In the eye of the law all damages are suffered when the injury is inflicted, and time only develops and discloses the extent thereof. And as the plaintiff can have but one action for the same injury, he may recover for future damages when he sues: Sh. & Redf., § 597; *Kennedy v. N. Mo. R. R. Co.*, 36 Mo. 351, 365; *Frink v. Schroyer*, 18 Ills. 416; *Peoria Bridge Ass'n v. Loomis*, 20 Ills. 235, 252; *Hunt v. Hoyt*, 20 Ills. 544; *Carter v. Rochester & Syracuse R. R. Co.*, 18 N. Y. 534, 542; *Hopkins v. Alb. & St. Law. R. R. Co.*, 36 N. H. 9, 14, 15. But such future damages as well as all damages must be reasonably certain. It is not sufficient that they appear possible or probable, to entitle the plaintiff to recover for them: *Curtis v. Rochester & Syracuse R. R.*, *supra*. The law seeks compensation, but how can one be compensated for what he has not lost? On this ground it was formerly held



that one could not recover for profits lost through the negligence of another, they being considered as too uncertain : Sh. & Redf., 599 ; *Smith v. Coudry*, 1 How. 28, 35 ; *Benson v. Melden & Melrose Gas Light Co.*, 6 Allen 149. But now the plaintiff is entitled to recover if he prove that the profits were reasonably certain : Sh. & Redf., § 599 ; *Griffin v. Colver*, 16 N. Y. 489, 491, 492, 494, 495 ; see *Williamson v. Barrett*, 13 How. 100. Where the damages answer these requisites but it is impossible accurately to determine the amount, the rule seems to be that the wrongdoer must suffer the burden of the difficulty and may be required to pay the larger sum : Sh. & Redf., § 594 ; see *Duke of Leeds v. Earl of Amhurst*, 20 Beav. 239 ; Rule in case of injury to chattels : Addison 204.

It seems well settled that the wrongdoer cannot give the fact, that the plaintiff was insured and received compensation from the insurer, in evidence in mitigation of damages : Sh. & Redf., § 609 ; Addison 205 ; *Althorpf v. Wolfe*, 22 N. Y. 355. The wrongdoer certainly has nothing to do with such contract of insurance. But a very different question arises where the insurer seeks to be subrogated to the rights of the insured : Addison 205.

The rule as to exemplary or punitive damages differs, of course, widely from that for compensation, as they are allowed only in cases of gross negligence, where the act partakes of a criminal nature, it would seem to follow that such damages cannot be recovered from a master, as such, who is personally without fault : Sh. & Redf., § 601 ; *Morford v. Woodworth*, 7 Ind. 83, 85. But he is not thus without fault if he knew of the negligent habits of the servant and yet retained him. In this case exemplary damages may, it seems, be recovered from the master, if they might be recovered from the servant : Sh. & Redf., § 601. On principle it seems that parents and masters cannot recover exemplary damages for injuries to their servants or children, their right of action arising from their loss of service ; Sh. & Redf. § 608 ; *Oakland R. W. Co. v. Fielding*, 48 Penn. St. 320 ; *Penn. R. R. Co. v. Kelley*, 31 Penn. St. 372, 378, 379. The rule in cases of seduction allowing damages beyond the value of the services lost, is, and is generally acknowledged to be an exception : Sh. & Redf., § 608. So it seems that executors and administrators cannot recover exemplary damages : Sedgw. p. 532, n. Whenever the law allows exemplary damages, the jury may consider all the circum-

stances and assess such damages as will not only compensate the injured party, but serve to warn and deter others from similar acts, and their verdict will be disturbed only, if they assess outrageously excessive damages.

The measure of damages finally in cases where the negligence results in death, is not uniform. The remedy being given by the statute, the rule and measure of damages depends on such statute. In some states pecuniary damages only may be recovered (*Penn. R. R. Co. v. Zellie*, 33 Penn. St. 318, 328, 329; *Penn. R. R. Co. v. Henderson*, 51 Penn. St. 315, 320), while others seem to allow exemplary damages (*Bowler v. Lane*, 3 Metc. (Ky.) 311, 318; *Murphy v. N. Y. & New Haven R. R. Co.*, 29 Conn. 496), and still others give a certain sum under certain circumstances, for instance Missouri.

In endeavoring to treat of all the principal points that arise in the subject spoken of in the foregoing pages, we were compelled to be brief, and have, perhaps, sometimes been obscure. But we hope that reference to the authorities cited will in such cases explain what is obscure.

CHRISTIAN KOERNER.

St. Louis, Mo.

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## RECENT AMERICAN DECISIONS.

### *Court of Appeals of Kentucky.*

#### SECOND NATIONAL BANK OF LOUISVILLE v. NATIONAL STATE BANK, NEWARK, N. J.

The national banks have no lien upon shares of their capital stock for the security of the indebtedness of the owners and holders of such shares.

Where the owners of such shares assign them *bonâ fide*, in security for actual indebtedness, and give the creditor power to transfer such shares upon the books of the bank, it creates such a lien in favor of the creditor as will be protected under the Bankrupt Law of the United States.

Where, more than two years after the creation of such lien, proceedings in bankruptcy are instituted and prosecuted to final discharge of the debtor without any notice being taken by the assignee or the court of the indebtedness or the assignment of such shares in security, such discharge of the debtor will have no effect upon the lien created by the assignment, and the assignee may compel, in a court of equity, the perfecting of his title to the shares so assigned upon the books of the bank.

The present Bankrupt Law leaves it optional with the assignee in bankruptcy whether or not to pursue property of the bankrupt which has been pledged or mortgaged for the security of the bankrupt's debts. If he is of opinion that anything may be saved to the estate by paying the debt so secured and taking the property